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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GERALD WINTERS,
PAUL RAY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented

1. Whether the agreement element of RICO conspiracy (18 U.S.C. § 1962[d]) requires an agreement to personally commit racketeering acts, as the First and Second Circuits have long held, or merely an agreement to the commission of racketeering acts by others, as the Third Circuit held in this case.

2. Whether the Court of Appeals erred in affirming petitioner Winters' RICO conspiracy conviction based on one theory when the jury, not properly instructed on an element of the crime, likely based its verdict on a second theory that fails to come within the statutory definition of the crime.

3. May a Court of Appeals affirm the trial court's rejection of a defendant's Batson claim as to a hispanic member of the venire, without addressing

the defendant's prima facie case, when the government offered explanations for its peremptory challenges of other minority jurors but offered no explanation for its challenge of the hispanic venireperson.

List of Parties

Apart from the petitioners, the other party to the appeal before the United States Court of Appeals for the Third Circuit, whose judgment is sought to be reviewed, was Darrin Casper. Casper's conviction was reversed for reasons unrelated to the issues raised in this petition.

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No: _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

GERALD WINTERS and
PAUL RAY,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Gerald Winters and Paul Ray respectfully request that a writ of certiorari issue to review judgments of the United States Court of Appeals for the Third Circuit entered on February 12, 1992.

Opinions Below

A copy of the unpublished opinion of the United States Court of Appeals for the Third Circuit, United States v. Gerald Winters, Docket No. 91-5243 (3d Cir. February 12, 1992), is annexed in the Appendix hereto at pages 1a - 26a. This opinion incorporates by reference part of an opinion of the United States Court of Appeals for the Third Circuit, United States v. Darrin Casper, 956 F.2d 416 (3d Cir. 1992), annexed in slip opinion form in the Appendix hereto at pages 27a - 41a. A copy of the order of the Third Circuit Court of Appeals which denied Winters' petition for rehearing appears in the Appendix at pages 42a - 43a. A copy of the Judgment Order of the United States Court of Appeals for the Third Circuit, United States v. Paul Ray, Docket No. 91-5226 (February 12, 1992), is annexed in

the Appendix hereto at pages 44a - 45a. A copy of the order of the Third Circuit Court of Appeals which denied Ray's petition for rehearing appears in the Appendix at pages 46a - 47a.

Statement of Jurisdiction

The decisions of the United States Court of Appeals for the Third Circuit affirming the convictions were entered on February 12, 1992. On March 11, 1992, the orders of the Court of Appeals denying the petitions for rehearing were entered and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions

Fifth Amendment, United States Constitution:

No person shall be ... deprived of life, liberty, or property, without due process of law ....

Title 18 U.S.C. § 1961(5):

"pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering.

Title 18 U.S.C. §§ 1962(c), (d):

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity....

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Statement of the Case

Gerald Winters and Paul Ray, the petitioners, were convicted following a jury trial in the United States District Court for the District of New Jersey before the Honorable Maryanne Trump Barry.[1] Petitioners were named with eight other defendants in a nine-count indictment.

Petitioner Winters was convicted of racketeering, in violation of 18 U.S.C. § 1962(c) (RICO); racketeering conspiracy, in violation of 18 U.S.C. § 1962(d) (RICO conspiracy); two counts of extortion conspiracy, in violation of 18 U.S.C. § 1951; and traveling in interstate commerce with intent to commit a crime of violence and to further the crime of extortion, in violation of 18 U.S.C. § 1952 (The Travel

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[1] The District Court had subject-matter jurisdiction over this case pursuant to Title 18 U.S.C. § 3231.

Act). Petitioner Ray was convicted of racketeering, in violation of 18 U.S.C. § 1962(c) (RICO) and acquitted of all other charges. Winters was the only defendant convicted of RICO conspiracy.

In convicting petitioner Winters of racketeering and racketeering conspiracy, the jury indicated that the government had proven petitioner's participation in five racketeering acts and petitioner's agreement to the commission of the same five racketeering acts.

On March 13, 1991, petitioner Winters was sentenced to a prison term of 235 months on the RICO conspiracy count. Petitioner also received consecutive sentences for the substantive RICO and other convictions resulting in an aggregate sentence of 415 months. The district court also ordered petitioner to pay fines totalling $450,000. A

forfeiture, pursuant to the RICO statute, was also imposed in the amount of $650,000. The district court sentenced petitioner Ray, also on March 13, 1991, to a prison term of thirty-seven months.

Petitioners filed notices of appeal to the United States Court of Appeals for the Third Circuit on March 20, 1991. On February 12, 1992, the Court of Appeals denied petitioners' appeals and affirmed their convictions. Specifically, the Court of Appeals rejected petitioners' claim that the government had discriminated against black venirepersons in its exercise of peremptory challenges in violation of Batson v. Kentucky, 476 U.S. 79 (1986) and Powers v. Ohio, 111 S.Ct. 1364 (1991) (24a - 25a, 29a - 33a).[2]

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[2] The Court of Appeals did not specifically address petitioners' claim that the government's pattern of discriminatory peremptory challenges included a challenge to a hispanic juror.

Additionally, the Court of Appeals affirmed petitioner Winters' RICO conspiracy conviction upon concluding that there was sufficient evidence that an unindicted coconspirator, Rick Graef, had conspired with petitioner to violate RICO in that Graef had agreed to the commission by others of two racketeering acts constituting a pattern of racketeering (8a - 12a). On March 11, 1992, the Court of Appeals denied Winters' and Ray's petitions for rehearing.[3]

Statement of Facts

Petitioner Gerald Winters headed an organization that engaged in the lawful manufacture and door-to-door sale of candy

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[3] Petitioner Ray, unaffected by the issues relating to petitioner Winters' RICO conspiracy conviction, joins only in the argument that the writ should be granted because of the Batson violation, the third argument presented in this petition.

products in a number of states during the 1970's and 1980's. Petitioner's nine co-defendants were employees of various entities comprising the Winters' organization, the racketeering enterprise named in the indictment. The case against the defendants rested largely upon the testimony of competitors of the Winters' organization, some of whom were disloyal former employees, concerning threats and violence directed against them or against their property by petitioner, his co-defendants, and other alleged unindicted coconspirators.

The jury heard testimony concerning seventeen predicate acts of racketeering.[4] Rick Graef, a former Winters' organization employee,

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[4] The RICO conspiracy count specifically incorporated by reference the predicate acts of racketeering alleged in the substantive RICO count.

acknowledged his participation in two racketeering acts during the period he was associated with the Winters' organization: burning the van of a competitor's employee at petitioner's behest, in Milwaukee, Wisconsin in February, 1972 (the "Lawrenz racketeering act"); and beating another competitor, with petitioner and others, in Dallas, Texas in July, 1982 (the "Anderson racketeering act").

Testimony from Graef and another beating victim, Grover Goodwin, indirectly linked Graef to a third racketeering act. Two men, one of whom Goodwin identified as one of petitioners' codefendants, assaulted Goodwin in 1983. Graef did not personally participate in the offense, nor did he direct others to commit the offense.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW, AFFIRMING PETITIONER WINTERS' RICO CONSPIRACY CONVICTION BASED UPON HIS ALLEGED COCONSPIRATOR'S AGREEMENT TO THE COMMISSION OF TWO RACKETEERING ACTS BY OTHERS, CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF 18 U.S.C. §§ 1962(C), (D).

In the court below, petitioner Winters challenged the sufficiency of the evidence that there was another individual who conspired with him to violate RICO. Petitioner's argument was premised upon the fundamental requirement that at least two culpable participants are required to constitute a conspiracy.[5] See, e.g., Rogers v. United States, 340 U.S. 367, 375

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[5] The jury was instructed in this case that a "person cannot conspire with himself and you can not find a defendant guilty of a particular conspiracy unless you find that he participated in that conspiracy with at least one other person associated with the conspiracy."

(1951); Morrison v. California, 291 U.S. 82, 92, 93 (1934). Therefore, petitioner argued, he could not be guilty of RICO conspiracy unless there was legally sufficient evidence that another individual was also guilty of conspiring with him to violate RICO.

In affirming petitioner's RICO conspiracy conviction, the Court of Appeals concluded that there was legally sufficient evidence that an unindicted individual, Rick Graef, had conspired with petitioner to violate RICO. To reach this conclusion, the Court of Appeals applied its interpretation of the agreement element of RICO conspiracy that conflicts with the interpretation accorded the statute by other Courts of Appeals.[6]

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[6] The district court instructed the jurors that they could find an individual guilty of RICO conspiracy only if they concluded that the individual "agreed to the commission by himself or by others of

18 U.S.C. § 1962(d), the RICO conspiracy provision, proscribes conspiracies to violate any one of RICO's substantive provisions. In conjunction with 18 U.S.C. § 1962(c), RICO conspiracy prohibits an agreement to conduct or participate, directly or indirectly, in the affairs of an enterprise through a pattern of racketeering. There continues to be much disagreement between the Courts of Appeals concerning the contents of an agreement to violate RICO.

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at least two acts of racketeering activity as charged in the indictment." The district court further cautioned the jurors that they did not have to find "that the defendant personally committed or agreed to commit any racketeering acts to find him guilty of conspiracy ...." Petitioner had requested that the district court instruct the jurors that an individual conspires to violate RICO only if he agrees to personally commit at least two acts of racketeering as alleged in the indictment. The Court of Appeals approved the district court's instructions (25a).

The Intercircuit Conflict

More than six years ago, Justice White observed that "[t]he Courts of Appeals disagree as to the proper interpretation of 18 U.S.C. § 1962(d), the RICO conspiracy statute." Adams v. United States, 474 U.S. 971 (1985) (White, J., dissenting from denial of certiorari). Some circuits had concluded that a RICO conspiracy requires an agreement by the alleged RICO coconspirator to personally commit at least two acts of racketeering activity. See, e.g., United States v. Ruggiero, 726 F.2d 913, 921 (2d Cir.), cert. denied sub nom. Rabito v. United States, 469 U.S. 831 (1984); United States v. Winter, 663 F.2d 1120, 1136 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983). Other circuits, including the Third Circuit in United States v. Adams, 759 F.2d 1099, 1116 (3d Cir.), cert. denied,

474 U.S. 971 (1985), had rejected this "agreement to personally commit" requirement in favor of a requirement that the alleged RICO coconspirator need only agree to the commission of the racketeering acts by another RICO coconspirator. See, e.g., United States v. Carter, 721 F.2d 1514, 1529-1531 (11th Cir.), cert. denied sub nom Morris v. United States, 469 U.S. 819 (1984). The passage of time has not resolved this intercircuit conflict. Compare United States v. Sanders, 929 F.2d 1466, 1473 (10th Cir. 1991) (adopting the Second Circuit's construction in Ruggiero, supra) with United States v. Pryba, 900 F.2d 748, 760 (4th Cir.), cert. denied, 111 S.Ct. 305 (1990) (White, J., dissenting) and United States v. Kragness, 830 F.2d 842, 859 (8th Cir. 1987) (adopting the Third Circuit's construction in Adams, supra).

Resolution of this conflict is necessary for the disposition of petitioner's claim that his RICO conspiracy conviction should be reversed. The Court of Appeals concluded that Rick Graef was petitioner's RICO coconspirator in that Graef had agreed to the commission by others of two racketeering acts constituting a pattern of racketeering activity (9a - 11a). With respect to one of these two racketeering acts, the Goodwin assault, there is no dispute that Graef did not agree to personally commit this racketeering act. Indeed, the Court of Appeals specifically found that Graef had agreed to the commission of the Goodwin act by two of petitioners' codefendants (6a). Therefore, if the RICO conspiracy statute requires an agreement to personally commit the racketeering acts, Graef could not be petitioner's RICO

coconspirator because Graef agreed to personally commit only one racketeering act rather than the minimum of two necessary to constitute a pattern of racketeering activity.[7] 18 U.S.C. § 1961 (5).

In Winter, supra, the First Circuit explained that the agreement to personally commit requirement was necessary to protect those who might otherwise be convicted through guilt by association. The First Circuit approach insures that

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[7] There was evidence associating Graef with three racketeering acts alleged in the indictment: the Lawrenz act occurring in February, 1972; the Anderson act occurring in July, 1982; and the Goodwin act occurring in the mid-1983. The Court of Appeals focused on Graef's agreement to the commission of the latter two racketeering acts because the first two acts, occurring more than ten years apart, do not constitute a pattern of racketeering activity. See 18 U.S.C. § 1961(5) (pattern of racketeering requires, inter alia, at least two acts of racketeering activity, the last of which occurred within ten years after the prior act).

proof of one's association with an enterprise is not, by itself, sufficient proof of one's agreement to conduct the affairs of the enterprise through a pattern of racketeering. Indeed, the Seventh Circuit, which rejected the First Circuit's resolution of the issue, conceded that a defendant's agreement to conduct the affairs of an enterprise would manifest itself in the same way as a defendant's agreement to the commission of racketeering acts. United States v. Neapolitan, 791 F.2d 489, 499 (7th Cir.), cert. denied, 479 U.S. 939 (1986). If that is true, a defendant who was associated with the enterprise but did not agree to the commission of two predicate crimes would give the same manifestations as one who did so agree and a jury would not be able to distinguish between the two.

The agreement to personally commit requirement is criticized because it allegedly undermines Congress' principal objective of targeting organized crime leaders who insulated themselves from the physical commission of the crime. Id. at 498. This criticism is simply unfounded. The agreement to personally commit requirement is satisfied not only by an agreement to actually physically commit the racketeering acts, but also by an agreement to aid and abet or cause the commission of the acts. See United States v. Rastelli, 870 F.2d 822, 831-832 (2d Cir.) (RICO conspiracy conviction affirmed where defendant agreed to aid and abet the commission of racketeering acts constituting a pattern of racketeering activity), cert. denied sub nom. Agar v. United States, 493 U.S. 982 (1989).

The existence of this intercircuit conflict leads to grossly unfair consequences. Had petitioner been prosecuted across the Hudson River, in New York City rather than in Newark, New Jersey, his RICO conspiracy conviction and sentence of nearly twenty years would have been reversed. Continued disunity among the circuits on an issue of statutory construction "is bad enough with respect to any statute, but it is intolerable with respect to RICO." H.J. Inc. v. Northwestern Bell Telephone Company, 492 U.S. 229, 255 (1989) (Scalia, J., concurring). This Court should grant certiorari to resolve the persistent conflict between the Courts of Appeals on this important statutory question.

II.

THE COURT OF APPEALS' AFFIRMANCE OF PETITIONER WINTERS' RICO CONSPIRACY CONVICTION IS IRRECONCILABLE WITH THIS COURT'S VIEWS IN GRIFFIN v UNITED STATES AND YATES v UNITED STATES BECAUSE THERE IS A SUBSTANTIAL LIKELIHOOD THAT THE JURY'S VERDICT WAS BASED UPON ANOTHER THEORY THAT DID NOT COME WITHIN THE STATUTORY DEFINITION OF THE CRIME.

The Court of Appeals affirmed petitioner Winters' RICO conspiracy conviction, concluding that the evidence was legally sufficient to establish that Rick Graef, an alleged unindicted coconspirator, agreed with petitioner to the commission by others of two racketeering acts constituting a pattern of racketeering activity (9a - 11a). The evidence, and the district court's incomplete jury instruction on the "pattern of racketeering activity" element of RICO, demonstrate that there was a substantial likelihood that the jury's

verdict was based upon a legally defective "pattern of racketeering activity". The Court of Appeals decision ignores prior Third Circuit precedent, precedent in other circuits, and decisions of this Court requiring reversal where the jury's verdict may be based upon a legally defective theory of the crime.

In defining "pattern of racketeering activity" for the jury, the district court omitted the requirement that the last racketeering act must occur within ten years of the prior act.[8] 18 U.S.C. §

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[8] Neither counsel for the government nor counsel for the defendants alerted the district court to this omission. The likely reason for this was that the jury was presented with a special verdict sheet requiring them to indicate whether or not a defendant agreed to the commission of each racketeering act allegation. Whether or not a defendant agreed to the commission of racketeering acts satisfying the temporal requirement of the pattern requirement could then be easily determined by reference to the verdict sheet. Here, however, the jury acquitted every defendant of RICO conspiracy except

1961(5). Laboring under the misimpression that "a pattern of racketeering activity" could include two acts occurring more than ten years apart, the jury may well have convicted petitioner based upon its conclusion that Rick Graef agreed to the commission of the Lawrenz racketeering act occurring in February, 1972, and the Anderson racketeering act occurring in July, 1982. Moreover, Graef himself admitted his direct participation in the Lawrenz and Anderson acts, while his role if any in the Goodwin act was far more ambiguous.[9]

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for petitioner. Thus the issue on appeal became whether the jury properly determined that an unindicted coconspirator agreed to the commission of racketeering acts constituting a pattern of racketeering.

[9] Indeed, in opposing petitioner's legal sufficiency argument to the Court of Appeals, the government did not argue that Graef agreed to the commission of the Goodwin racketeering act.

Under these circumstances, the Court of Appeals should have been guided by the reasoning of Yates v. United States, 354 U.S. 298 (1957), as limited by this Court's recent opinion in Griffin v. United States, 112 S.Ct. 466 (1991). In Yates v. United States, 354 U.S. 298 (1957), a jury returned a general verdict of guilty against the defendant on a conspiracy to violate two statutory provisions of the Smith Act of 1940. This Court noted that one of the two objectives of the conspiracy was legally defective because prosecution under that statutory provision was barred by the statute of limitations. Id. at 312. The Court stated that "under these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on

another, and it is impossible to tell which ground the jury selected." Id. In Griffin v. United States, 112 S.Ct. 466 (1991), this Court disavowed the sweeping language of Yates. Specifically, the Court distinguished Yates, where one of the two grounds for a conspiracy conviction was legally inadequate, from cases where one of several objectives of a conspiracy conviction were not proven by sufficient evidence. The Court held that only in the former situation would a reversal be required. Id. at 474. The Court explained:

> Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law-whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own

> intelligence and expertise will save them from that error.

Id. (Emphasis added).

The principle of Yates and Griffin applies to petitioner's RICO conspiracy conviction. The district court's instructions permitted the jury to convict petitioner of conspiring with Graef if it concluded that Graef agreed to the commission of two racketeering acts alleged in the indictment, without regard to the RICO pattern temporal requirement. Therefore, the district court's instructions permitted the jury to conclude that Graef agreed with Winters to the commission of a pattern of racketeering based upon the Lawrenz and Anderson racketeering acts or upon the Anderson and Goodwin racketeering acts. Obviously, the Lawrenz/Anderson ground is legally deficient. These two racketeering acts do not "come within the statutory

definition of the crime" in that, together, they do not constitute a pattern of racketeering. 18 U.S.C. § 1961(5). This is precisely the situation envisioned in Griffin: "jurors have been left the option of relying upon a legally inadequate theory." Griffin, supra, 112 S.Ct. at 474. Moreover, it is impossible to tell from the jury's verdict which of these two grounds the jury selected. The guilty verdict as to Winters served, in effect, as a general verdict on Graef's participation in the RICO conspiracy.

Ironically, the Third Circuit is alone among the Courts of Appeals in extending the holding of Yates to cases of evidentiary insufficiency in apparent disregard of Turner v. United States, 396 U.S. 398 (1970). See, e.g., United States v. Velasquez, 885 F.2d 1076, 1091 (3d Cir. 1989), cert. denied, 494 U.S. 1017 (1990);

United States v. Tarnopol, 561 F.2d 466, 474-475 (3d Cir. 1977). Yet, in the case below, it failed to apply Yates despite the fact that the jury quite clearly may have relied upon a legally incorrect definition of the crime. The Court of Appeals' misapplication of the rule in Yates requires that certiorari be granted here.

III.

THE TOTALITY OF CIRCUMSTANCES SURROUNDING THE GOVERNMENT'S CHALLENGE OF A HISPANIC VENIREPERSON, INCLUDING THE GOVERNMENT'S CHALLENGE OF FIVE OTHER MINORITY VENIREPERSONS, CREATED AN INFERENCE OF DISCRIMINATION AND REQUIRED A RACIALLY NEUTRAL EXPLANATION.

Petitioners argued during jury selection and to the court below that the government had exercised its peremptory challenges against one hispanic and five black venirepersons in a racially discriminatory manner in violation of the equal protection rights of the minority venirepersons. Batson v. Kentucky, 476 U.S. 79 (1986).[10] The Court of Appeals affirmed the district court's rejection of petitioners' Batson challenge. By

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[10] As this was a federal prosecution, petitioners relied upon the equal protection component of the 5th Amendment due process clause. See, e.g., Buckley v. Valeo, 424 U.S. 1, 93 (1976).

ignoring petitioners' claim concerning the hispanic venireperson, the court below impliedly sanctioned the district court decision that was in conflict with this Court's recent decision in Powers v. Ohio, 111 S.Ct. 1364 (1991).

The district court rejected petitioners' argument as to the hispanic potential juror because petitioners are not hispanic, a standing requirement that this Court subsequently eliminated in Powers, supra.[11] As to the black venirepersons, the district court concluded that petitioners' two black codefendants had not established a prima facie case of discrimination. Nevertheless, the government volunteered reasons for excluding the black prospective jurors.

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[11] Petitioners and five of their codefendants were white. Two codefendants were black.

The Court of Appeals affirmed the district court's rejection of petitioners' Batson challenge without specifically ruling on the question of whether petitioners had established a prima facie case of discrimination as to the hispanic and black venirepersons. Rather, the court below reviewed the government's explanations for its challenges to black venirepersons and concluded that the district court had not clearly erred in crediting these explanations (21a).

This approach is consistent with this Court's observations in Hernandez v. New York, 111 S.Ct. 1859 (1991) that the issue of whether the defendant has made out a prima facie case is moot once the prosecutor offers race-neutral explanations and the trial court has ruled on the ultimate issue of discrimination. Id. at 1866. The government, however,

offered no explanation for its challenge to the hispanic member of the venire, Jesus Rosario. The Court of Appeals ignored its own precedent, and precedent in other circuits, that even a single unexplained peremptory challenge may constitute an equal protection violation and is sufficient to require a new trial under Batson. Harrison v. Ryan, 909 F.2d 84 (3d Cir.), cert. denied, 111 S.Ct. 568 (1990); United States v. Horsley, 864 F.2d 1543 (11th Cir. 1989); United States v. Battle, 836 F.2d 1084 (8th Cir. 1987). Therefore, because the Court of Appeals failed to address petitioners' claim that they had established a prima facie case as to Rosario, and because the government failed to offer any explanation for this peremptory challenge, this Court should grant certiorari.

The Prima Facie Showing as to Rosario

As this Court noted, to establish a prima facie showing of racial discrimination, the defendant must first show that the challenged juror was a member of a cognizable racial or ethnic group. Hispanic jurors are clearly members of a cognizable racial or ethnic group. See, e.g., Hernandez v. New York, supra.

The defendant must also show that the relevant facts and circumstances of the case raise an inference that the prosecution used its peremptory challenges to exclude members of the venire on account of their race. Batson, supra, 476 U.S. at 96. The relevant circumstances of this case included the government's challenges of the black venirepersons. The government's challenges of all minorities informs a court's decision as

to whether the government discriminated against any one minority venireperson. See United States v. Alvarado, 923 F.2d 253, 255-256 (2d Cir. 1991).

Petitioners detailed for the Court of Appeals a number of circumstances that, together, raised an inference that the government exercised its peremptory challenges in a racially discriminatory manner. First, the government exercised six of its nine peremptory challenges against minority venirepersons and one additional challenge to a venireperson of undetermined but possibly Arabic descent.

Second, the government attempted to alter the composition of the venire by requesting that the district court replace certain venirepersons with individuals from counties that together had one-third as many blacks and one-half as many hispanics as the counties from which the

venirepersons resided. Petitioners argued that this was a transparent attempt to reduce the number of minorities on the venire.

Third, the government clearly believed that the venire had a disproportionate number of blacks. The prosecutor, in defending its peremptory challenges, observed that half of the venire was black. This observation by the prosecutor was disputed by the defense and belied by the district court's observation that this venire was "the fairest cross-section [it had] seen sometime in Newark." Fourth, the government repeatedly challenged black jurors who had replaced the jurors excused by the defense.

Fifth, petitioners pointed to circumstances about their case that would have led the government to believe that minority jurors would be especially

sympathetic to the defendants. Indeed, in its opening statement the government anticipated and sought to blunt the Winters' organization's appeal to minorities based on the organization's ability to provide urban minority youths with employment opportunities.

Petitioners also described other circumstances peculiar to the government's exclusion of the hispanic juror, Jesus Rosario, that made the prima facie case as to Rosario even more compelling. The challenge to Rosario was highly suspect because the government had declined to exercise a peremptory challenge, and announced its satisfaction with the jury, when Rosario was on the panel. The government acknowledged in its brief to the Court of Appeals that one possible inference to be drawn from this fact is that this might have been a response to a

change in the overall makeup of the jury caused by the exercise of a defense peremptory. In other words, the government removed Rosario from the jury in response to the defense having removed a non-minority from the jury. This racial counterbalancing constitutes a discriminatory purpose. Cf. United States v. DeGross, 913 F.2d 1417 (9th Cir. 1990) (gender counterbalancing constitutes discriminatory purpose), aff'd on rehearing en banc, 51 Crim.L.Rep. 1045 (9th Cir. 1992).

The inference of racial counterbalancing was strengthened by the fact that there was simply nothing in the record that would support even a highly subjective reason for excusing Rosario. Rosario's colloquy with the court consisted of completely innocuous polite conversation.

By failing to address petitioners' prima facie showing of racial or ethnic discrimination by the government in its exercise of a peremptory challenge against a hispanic juror, the Court of Appeals sanctioned the district court's standing ruling that conflicts with Powers v. Ohio, supra. In addition to this conflict with Powers, this Court should grant certiorari to resolve the important question of whether a Court of Appeals can avoid reviewing a prima facie showing of discrimination and reject a Batson argument when the government does not offer explanations for each of the challenged potential jurors.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
June 4, 1992

Respectfully submitted,

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APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-5243

UNITED STATE OF AMERICA

v.

GERALD WINTERS, a/k/a James Pierce,
a/k/a Ronald Rogers, a/k/a Jerry Domini

Gerald Winters, Appellant

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. Crim. No. 90---164-01)

Argued January 6, 1992

Before: COWEN, NYGAARD, and WEIS, Circuit Judges

Filed FEB 12 1992

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OPINION OF THE COURT

WEIS, Circuit Judge.

Defendant Winters was one of nine persons tried on an indictment charging various RICO, Hobbs Act, and Travel Act violations. The jury acquitted six of the defendants, but found Winters guilty of count one (conspiracy to violate RICO), count two (substantive RICO), and counts three, five, and six (Hobbs Act and Travel Act violations). All of the other defendants were acquitted of RICO conspiracy. Defendant Ray was found guilty of count two (substantive RICO), and defendant Casper was found guilty on counts five (Hobbs Act) and six (Travel Act). We will affirm Winters' convictions, but remand for resentencing.

The evidence described the

activities of an organization headed by Winters that operated business entities engaged in door-to-door sales of candy products in a number of states. The organization existed from the early 1970's until at least June 1988.

During the relevant years, the evidence established that Winters subjected competitors and disloyal employees to threats and violence. The jury found that Winters was guilty of burning the automobile of a competitor, David Lawrenz; personally participating in the beating of James Anderson, another competitor; and ordering the brutal beating of former employees Rick Graef and Grover Goodwin. In addition to constituting Hobbs Act and Travel Act violations, the findings of the jury as to these incidents established that Winters was operating his organization by the use

of threats, violence, and intimidation. The scenario presents a classic case of the type of criminal conduct that the RICO statute was intended to reach.

Winters raises a number of issues on appeal. We will first discuss his contention that the evidence was insufficient to establish the existence of a RICO conspiracy.

I. SUFFICIENCY OF CONSPIRACY EVIDENCE

Winters maintains that the jury verdicts acquitting his co-defendants on the conspiracy count necessarily established that none of the named defendants was a participant in the RICO conspiracy. Consequently, he argues that if he was guilty of conspiracy, his co-conspirator had to be one of the unindicted participants in Winters' operations, possibly Rick Graef or Daryl

and Laurie Gaertner.[1] He eliminates the Gaertners from consideration because the jury findings indicate that Winters had not agreed to the acts that the Gaertners perpetrated.

Thus far, we can accept Winters' assertions, at least for argument purposes. We conclude, however, that there was adequate evidence for the jury to conclude that Winters had conspired with Rick Graef.

The object of a RICO conspiracy is the violation of the statute. 18 U.S.C. § 1962(d). To be convicted of RICO conspiracy, as was Winters, a defendant must agree to conduct the affairs of an enterprise through a pattern of racketeering activity. A "pattern" must

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[1] The indictment accused Winters of conspiring with co-defendants "and others." Accordingly, the jury could conclude that Winters conspired with unindicted participants.

consist of at least two predicate acts. A defendant need not agree to personally commit two acts, he must simply agree to their commission.

The district judge instructed the jury that the government had the burden to prove that the defendant "agreed to the commission by himself or by others of at least two acts of racketeering activity as charged in the indictment." The court charged that, in addition, the government had to prove that "the defendant was generally aware of the scope of the enterprise and knowingly and wilfully agreed to the commission by himself or others of two or more racketeering acts to further the enterprise's involvement in criminal activity." The jurors were also told that "[y]ou must be unanimous on at least two charged acts as to a particular

defendant."

As we understand Winters' argument, it is that the government had to prove that he had agreed with one other person to the commission of at least two racketeering acts. Because the jury found Winters had agreed to five of the acts listed in the indictment, he asserts that another participant had to agree to the commission of at least two of the same acts. This is perhaps an interpretation of law more favorable to the defendant than that to which he was entitled. See United States v. Campione, 942 F.2d 429, 436-37 (7th Cir. 1991); United States v. Pungitore, 910 F.2d 1084, 1102-04 (3d Cir. 1990); United States v. Phillips, 874 F.2d 123, 127-30 (3d Cir. 1989); United States v. Neapolitan, 791 F.2d 489 (7th Cir.), cert. denied, 479 U.S. 940 (1986). Nevertheless, even adopting Winters'

argument, the evidence supports his conviction on the premise that he conspired with Rick Graef to violate 18 U.S.C. § 1962(c) by agreeing to the commission of two racketeering acts.

Graef testified that he began working for the organization in 1971 and that he gradually worked his way up in the hierarchy so that from 1982 to 1985 he was the national sales manager and worked with Winters on a daily basis. He was well aware of Winters' methods of dealing with competitors and disloyal associates. Graef admitted that he set fire to a competitor's automobile in 1972 and that in 1973 he participated with Winters in an attempt to intimidate a competitor by brandishing a pistol.

There is sufficient evidence that Graef agreed to two of the five acts the jury indicated it found proven as to

Winters. In 1982, Graef and Winters personally participated in the brutal beating of Jim Anderson. Winters, therefore, concedes that the evidence supports a conclusion that the two agreed to the commission of this racketeering act. (Appellant's Brief at 25).

The evidence also establishes Graef's participation with Winters in the commission of the assault on Grover Goodwin in 1983. Graef testified that Goodwin had worked for Winters in California. When it appeared that Goodwin had inventory shortages and owed money to Winters, Graef discussed the situation with Winters and they decided that "a visit needed to be made to him [Goodwin]." At a subsequent meeting, defendants Miller and Hanna, characterized by Graef as the "security" men for the organization, were told by Winters to "visit" with Goodwin.

Later, Miller told Graef that they had beaten Goodwin.

Graef also conceded that he "may have called Goodwin to 'warn' him" about a "visit." Goodwin, however, characterized this "warning" differently. He testified that he received a call from Rick Graef in a sarcastic tone saying "I was going to receive a visitor." When Goodwin asked what was meant by that, Graef replied, "You'll find out." Thus, there was adequate evidence from which the jury could conclude that Graef and Winters had agreed to the commission of the assault on Goodwin by Miller and Hanna.

Therefore, even adopting Winters' theory that the government was required to prove that he and one other person had agreed to the commission of two of the racketeering acts designated in the indictment, the record is adequate to

sustain the conspiracy conviction.

II. EVIDENTIARY RULINGS

Winters contends that the trial court erred in limiting his cross-examination of witness Graef as to his bias as demonstrated by his reaction to the results of a lie detector test. The ruling was well within the discretion of the trial judge and did not constitute reversible error.

Winters also asserts that the admission of prior "bad acts" was unduly prejudicial. The trial court, however, properly balanced the probative value of the evidence against the possibility of unfair prejudice. We find no reversible error in the trial court's ruling.

III. APPLICATION OF THE SENTENCING GUIDELINES TO THE CONSPIRACY CONVICTION

The district court sentenced Winters under the Sentencing Guidelines on count one (RICO conspiracy). The court

sentenced him under pre-guidelines law on the remaining counts. Winters argues that the jury's findings that he agreed to only five predicate acts negated the government's proposition that the conspiracy continued beyond November 1, 1987, the effective date of the Sentencing Guidelines.

The government, however, relies on the explicit findings of the trial judge who stated at sentencing, "The jury and its strange verdict aside, all of these acts [including some in 1988] were proved beyond a reasonable doubt." Earlier the judge had stated, "I'm absolutely clear that Count 1 is a guideline count," citing United States v. Rosa, 891 F.2d 1063, 1069 (3d Cir. 1989), and United States v. Moscony, 927 F.2d 742, 754 (3d Cir.), cert. denied, 111 S. Ct. 2812 (1991). The judge stated also,

"[t]here is no evidence that any defendant withdrew from the conspiracy at any time prior to that date [of the indictment], indeed, acts were committed by some of the conspirators after November 1, 1987, clearly the conspiracy continued past November 1, 1987, and Mr. Winters was part of that conspiracy throughout its existence."

We have held that sentencing decisions are to be made by the trial judge using the preponderance of the evidence standard. See United States v. McDowell, 888 F.2d 285, 291 (3d Cir. 1989); United States v. Frierson, 945 F.2d 650, 652 (3d Cir. 1991). Other Courts have specifically held that whether criminal conduct continued after the effective date of the guidelines is a factual determination to be made by the trial judge based on a preponderance of

the evidence. See, e.g., United States v. Rossy, No. 91-1539, slip op. at 5 (7th Cir. Jan. 8, 1992); United States v. David, 940 F.2d 722, 739 (1st Cir.), cert. denied, 112 S. Ct. 605 (1991); United States v. Underwood, 932 F.2d 1049, 1053 (2d Cir.), cert. denied, 122 S. Ct. 382 (1911). Because this threshold is lower than that required for determinations of guilt, there is no inconsistency between the jury verdict and the trial judge's findings that the conspiracy extended beyond November 1, 1987.

Factual findings made by the trial judge are reviewable under the clearly erroneous standard. The findings here are amply supported by the record and not reversible under the clearly erroneous standard of review.

IV. CONSECUTIVE SENTENCE

The district court directed that

Winters' sentences on the pre-guideline counts, for the Hobbs Act, Travel Act, and substantive RICO violations, run concurrently. The court also ordered that its guideline sentence for RICO conspiracy would run consecutively to those imposed for the other counts.

The Hobbs Act and Travel act violations constituted the predicate offenses that established the pattern of racketeering activity for the RICO conspiracy conviction. In calculating the RICO conspiracy sentence, the district court properly considered the underlying predicate offenses. Winters argues that consequently, the district court engaged in "double counting" because the same conduct was considered in sentencing him for the pre-guideline Hobbs Act and Travel Act violations and in determining the appropriate sentence under the guidelines

for the RICO conspiracy. Double counting, he asserts, is contrary to the spirit of guidelines section 5G1.2 and violates the double jeopardy clause.

Guidelines section 5G1.2(c) reads: "If the sentence imposed on the count carrying the highest statutory maximum is adequate to achieve the total punishment, then the sentences on all counts shall run concurrently, except to the extent otherwise required by law." Thus, it is possible that had all of the offenses committed here come under the Guidelines, concurrent sentences would have been in order for both the conspiracy count and the offenses that constituted the predicate acts. Unfortunately for Winters, however, the predicate act offenses are pre-Guidelines violations and case law makes it clear that in that situation consecutive sentences are

permissible.

In United States v. Watford, 894 F.2d 665, 669 (4th Cir. 1990), the Court observed that nothing in the Sentencing Reform Act or the Guidelines precludes a district court from directing that a pre-Guidelines sentence be served consecutively to a sentence imposed on a Guideline count. The Court also noted that it was authorized to reverse a sentence under the Guidelines only in limited circumstances. Moreover, no provision was made in the statute to restrict the district court's discretion in determining whether pre-Guidelines sentences were to be concurrent or consecutive. Other courts have come to the same conclusion. See United States v. Ewings, 936 F.2d 903, 910 (7th Cir. 1991); United States v. Lincoln, 925 F.2d 255, 256-57 (8th Cir.), cert. denied, 111 S.

Ct. 2838 (1991); United States v. Parks, 924 F.2d 68, 71-73 (5th Cir. 1991).

Similarly, in United States v. Marrone, 746 F.2d 957, 959 (3d Cir. 1984), we concluded that consecutive sentences imposed on RICO conspiracy and its underlying predicate offenses did not conflict with congressional intent. Consequently, Winters' invocation of the double jeopardy clause and his challenge to the consecutive sentence must fail.

V. GUIDELINES COMPUTATION

The Sentencing Guidelines allow the district court to sentence a defendant applying the offense level for RICO, with a base level of 19, or the offense level for the underlying racketeering activity, whichever is higher. Here, the probation officer chose to look to Guidelines section 2E1.1(a)(2), the offense level applicable to the underlying racketeering

acts. Apparently he took this approach because the base level of 19 called for in section 2E1.1(a)(1) for RICO offenses plus enhancement would have yielded a lesser level.

The probation officer, pursuant to section 2E1.1(a)(2), determined the offense level for the underlying racketeering activity by calculating the offense level for each of Winters' predicate offenses and combining them under chapter three of the guidelines to produce an adjusted offense level. In considering each predicate offense, however, the probation officer applied the enhancement for leadership in the offense pursuant to section 3B1.1 of the Guidelines because of Winters' role in the overall conspiracy. When Winters' counsel called attention to this point, the district court responded that the

defendant's leadership in the conspiracy could be considered as relevant conduct under section 1B1.3 (relevant conduct provision) and, therefore, was a proper consideration for enhancement to each predicate offense.

On this appeal the government concedes that the court erred in light of United States v. Murillo, 933 F.2d 195 (3d Cir. 1991) (decided two months after the district judge made her ruling here). Pursuant to an amendment of the Guidelines effective November 1, 1990, consideration of relevant conduct within the scope of section 1B1.3 is permissible for enhancement, including that for leadership under section 3B1.1. However, because Winters' offense occurred before that date, "relevant conduct" should not have been considered. The appropriate standard is that set out in Murillo's

interpretation of Guidelines section 3B1.1 as applied to crimes occurring before the date of the amendment.

In Murillo, we said the word "offense" as used in section 3B1.1 means the "offense of conviction," and that the Guidelines applied to "all conduct in furtherance of the offense of conviction." 933 F.2d at 199. Murillo conceded that its interpretation was in the "middle ground" between consideration of only the offense of conviction on one hand, and all relevant conduct under section 1B1.3 on the other. Under Murillo, "the offense in § 3B1.1 includes the offense charged as well as the underlying activities and participants that directly brought about the more limited sphere of the elements of the specific charged offense." Id. at 199.

Because the record contains no

findings substantiating a leadership enhancement of four points to the offense level of each of the predicate acts under the Murillo test, we must remand for further consideration by the district court. The court should assess whether Winters was a leader under Murillo in each of the predicate offenses. A reassessment could possibly result in a reduction in the four units the probation officer calculated as applicable, see section 3D1.4, and thus lower the adjusted offense level.

We are aware that reevaluation by the district court of the factors involved in this Guidelines determination may result in the same sentence. Nonetheless, we are not free to do other than remand. As we understand the scheme of the Guidelines, our role is to oversee the calculation of minutiae rather than

pass judgment on the appropriateness of a sentence as a whole.

Winters' remaining contentions regarding his sentencing are that the district court improperly increased his offense level based upon the physical restraint of Anderson and that the court erred in applying a four level increase to three of the underlying predicate offenses because his victims suffered "serious bodily injury." We reject these arguments as lacking merit.

VI. THE BATSON ISSUE

Winters, together with his co-defendants, contends that the prosecutor's use of preemptory challenges during the jury voir dire violated the equal protection clause. The alleged violation of Batson v. Kentucky, 476 U.S. 79 (1986), is fully considered in the consolidated appeal of United States v. Casper (No. 91-

5227). The opinion on that point is incorporated here by reference and the Winters' challenge to the voir dire proceedings is rejected.

VII. REMAINING CLAIMS

Winters has a few remaining contentions. He argues that RICO is unconstitutionally vague, or, in the alternative, that the district court erred in not instructing the jury that a RICO conspiracy conviction requires proof that the defendant agreed to personally commit at least two predicate acts. We reject these arguments based on this Court's prior holdings. See, e.g., United States v. Adams, 759 F.2d 1099, 1115-16 (3d Cir.), cert. denied, 474 U.S. 906 (1985).

Winters also asserts that the district court improperly instructed the jury on evaluating identification testimony and that the court improperly

rushed the jury's deliberations. We find no merit in either of these assertions.

The judgments of convictions will be affirmed, but the case will be remanded for resentencing pursuant to part V. of this opinion.

TO THE CLERK:

Please file the foregoing Opinion.

Circuit Judge

Filed February 11, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-5227

UNITED STATES OF AMERICA

v.

DARRIN CASPER, a/k/a Barry Jackson,
Appellant

On Appeal from the United States District Court
for the District of New Jersey
D.C. Crim. No. 90-00164-09

Argued January 6, 1992
BEFORE: COWEN, NYGAARD, and WEIS,
Circuit Judges

(Filed February 11, 1992)

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OPINION OF THE COURT

Cowen, *Circuit Judge*.

Darrin Casper challenges the judgment of conviction entered against him following a jury trial. At issue in this appeal is whether the circumstantial evidence presented by the government against Casper for violations of the Travel and Hobbs Acts was sufficient to support the guilty verdict rendered by the jury. In addition, Casper contends that a new trial is required because the government used its peremptory challenges to exclude minority jurors from the petit jury venire in violation of the Equal Protection Clause of the Fourteenth Amendment. We conclude that the evidence was insufficient to convict and will reverse.

I.

On April 30, 1990, Casper and nine others were named in a nine-count indictment in the District of New Jersey. The indictment alleged a variety of RICO, Hobbs Act and Travel Act offenses. The allegations contained in the indictment centered around the door-to-door candy sales business run

by codefendant Gerald Winters. Following a trial of nine of the ten defendants, which lasted over two months, Casper was acquitted of all but Counts Five and Six. Count Five alleged a conspiracy to violate the Hobbs Act, 18 U.S.C. § 1951 (1988). Count Six alleged a violation of the Travel Act, 18 U.S.C. § 1952 (1988).

The district court had jurisdiction over this matter pursuant to 18 U.S.C. § 3231. This court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). A district court's determination that a defendant has failed to make a prima facie showing of racial discrimination in violation of the Equal Protection Clause will be reversed only if that determination is clearly erroneous. *United States v. Grandison*, 885 F.2d 143, 146 (4th Cir. 1989). As an appellate court reviewing the sufficiency of the evidence presented at trial, we must uphold the verdict of the jury "if there is substantial evidence, taking the view most favorable to the government, to support it." *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Aguilar*, 843 F.2d 155, 157 (3d Cir.), *cert. denied*, 488 U.S. 924 (1988).

II.

Casper contends that the government exercised its peremptory challenges against "minority" jurors in contravention of the Supreme Court's holding in *Batson v. Kentucky*, 476 U.S. 79 (1986). In *Batson* and its progeny, the Supreme Court set forth the factors necessary to make a prima facie showing of racial discrimination. First, the defendant must show that the challenged jurors were members of a cognizable racial or ethnic

group.[1] *United States v. DiPasquale*, 864 F.2d 271, 277 (3d Cir. 1988), *cert. denied*, 492 U.S. 906 (1989). Then the defendant must show that the relevant facts and circumstances of the case raise an inference that the prosecution used its peremptory challenges to exclude members of the venire from the petit jury on account of their race. *Batson*, 476 U.S. at 96. Relevant circumstances include "(1) the fact that peremptory challenges permit a prosecutor predisposed to discriminate to do so; (2) any other pattern of discriminatory conduct; and (3) any prosecutorial statements." *United States v. Clemons*, 843 F.2d 741, 746 (3d Cir.), *cert. denied*, 488 U.S. 835 (1988).[2] If the defendant makes out a prima facie case, the burden shifts to the prosecution to come forward with some neutral explanation for challenging black members of the venire. *Batson*, 476 U.S. at 97.

A race neutral explanation means an explanation based on something other than the race of the juror. *Hernandez v. New York*, 111 S. Ct. 1859, 1966 (1991) (plurality). At this stage the issue

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1. *Batson*'s requirement that there be racial identity between the defendant and the jurors subject to the peremptory challenge was eliminated by the Supreme Court in *Powers v. Ohio*, 111 S.Ct. 1364, 1373-74 (1991). *Powers* applies retroactively to this case, which was on direct appeal at the time *Powers* was decided. *See Holland v. Illinois*, 493 U.S. 474 (1990).

2. While *Batson* involved the application of the Fourteenth Amendment's Equal Protection Clause to state prosecutions, the same limitations are imposed on federal prosecutors by the Fifth Amendment. *United States v. Lane*, 866 F.2d 103, 104 n.1 (4th Cir. 1989); *United States v. Forbes*, 816 F.2d 1006, 1009 n.6 (5th Cir. 1987).

focuses on the facial validity of the prosecutor's explanation. Thus unless a discriminatory intent is inherent in the explanation, the reason offered will be deemed race neutral. *Id.*

The *Batson* Court stated that explanations must be "clear and reasonably specific." 476 U.S. at 98 & n.20. Explanations based on a prosecutor's mere "good faith" or "intuition" do not suffice. *Id.*; *See United States v. Horsley*, 864 F.2d 1543, 1546 (11th Cir. 1989) (per curiam) ("I just got a feeling about him" is insufficient). The government's explanation, however, need not rise to the level of just cause, *Batson*, 476 U.S. at 97, nor need it be "quantifiable" to be race neutral. *See United States v. Lance*, 853 F.2d 1177, 1181 (5th Cir. 1988). A district court may also choose to accept the prosecution's explanation as race neutral where it rests upon the prosecution's evaluation of a venireperson's credibility and demeanor. *See id.* (prosecutor's observation of eye contact and demeanor was significant and constituted neutral explanation of peremptory exclusion); *United States v. Hughes*, 911 F.2d 113, 114-15 (8th Cir. 1990) (challenges based on education, sarcastic responses, appearance, and background, were reasonably neutral).

The trial judge plays "a pivotal role" in determining whether a prima facie case has been established. *Clemons*, 843 F.2d at 745. *See also Batson*, 476 U.S. at 97, 98 n.21, 99 n.22; *United States v. Forbes*, 816 F.2d 1006, 1010 (5th Cir. 1987); *United States v. Allen*, 814 F.2d 977, 978 (4th Cir. 1987); *United States v. Mathews*, 803 F.2d 325, 330 (7th Cir. 1986), *rev'd on other grounds*, 485 U.S. 58 (1988). A trial judge's finding as to intentional discrimination or lack thereof is

a finding of fact. *Batson*, 476 U.S. at 98 n.21. We review for clear error. *United States v. Clemons*, 892 F.2d 1153, 1157 (3d Cir. 1989).

There will seldom be much direct evidence of discriminatory intent. Such invidious intent does not rear its ugly head for everyone to see; instead it hides behind the cloak of pretext. Consequently, the trial judge's finding of discrimination largely turns on evaluation of the credibility and demeanor of the attorney who exercises the challenge. *Hernandez*, 111 S. Ct. at 1870. This evaluation lies "peculiarly within a trial judge's province." *Id.* Because trial judges' experiences, instincts, and first-hand observations are so crucial, a reviewing court ordinarily should afford their findings "great deference." *Id.* at 1869.

Here the district court found that the defendants have failed to satisfy even the threshold requirement of showing a prima facie case of discrimination. This notwithstanding, the prosecutor placed on the record his race neutral reasons as to each black venireperson excluded. First, the prosecution excluded one venireperson because he expressed a preconceived opinion as to the legality of tape recording conversations without the knowledge of the speaker. *See United States v. Roberts*, 913 F.2d 211, 215 (5th Cir. 1990) (juror's preconceived notions of the legality of tape recordings even though he later changed his mind is a race neutral reason). Second, it excluded two venirepersons because it considered their responses in the voir dire evasive and inarticulate. *See United States v. Ruiz*, 894 F.2d 501, 506 (2d Cir. 1990) (juror's inarticulateness is a race neutral reason). Third, it excluded a venireperson who had hearing problems because it planned to

introduce tape recording evidence during the trial. *See United States v. Dawn*, 897 F.2d 1444, 1447 (8th Cir. 1990) (juror's vision and health problems are race neutral reasons); *United States v. Alston*, 895 F.2d 1362, 1367 (11th Cir. 1990) (hearing problems). Finally, the prosecution excluded another venireperson because she was a relative of a local politician who had recently been unsuccessfully prosecuted for extortion. *See United States v. Bennett*, 928 F.2d 1548 (11th Cir. 1991) (familial association with someone convicted of a crime is a race neutral reason).

For each of the government's explanations, the evidence fully supports the district court's finding of no discriminatory intent. That a defendant can point to facts consistent with a prima facie case is of no importance when we are reviewing a district court's findings under the "clearly erroneous" standard. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985). The prosecution provided valid reasons for all of the challenges made to black jurors and the district court, having the opportunity to gauge the prosecutor's credibility in defending his actions, chose to credit those explanations. We hold that the district court did not clearly err.

III.

Counts Five and Six were based on the same incident: the unsuccessful attempt, in Cypress, Texas, to burn an unoccupied van owned by Anthony Spatola. At trial, the government contended that the attempt to burn the van was meant to punish Spatola for competing with the

Winters organization in the sale of candy in the Houston area and to prevent Spatola from continuing such competition with Winters. Because the resolution of Casper's allegation as to the insufficiency of the evidence turns on the particular facts of this case and the evidence presented at trial, we set forth in some detail the events leading up to and concerning the attempted burning of Spatola's van.

Anthony Spatola had been involved in the door-to-door candy sales business on and off for a number of years. He had worked for Gerald Winters in both Los Angeles and Houston supervising and directing the door-to-door sales activities of teenagers employed by the Winters organization. Spatola left the employ of the Winters organization in 1986 and went to work for a candy company in Houston called United Teens as a crew manager and consultant to the distributor. In connection with his candy business, Spatola purchased a 1977 Dodge van. Evidence at trial established that in 1987, the Winters organization was also selling candy door-to-door in Houston.

In January, February and June of 1987, in the course of his employment with United Teens, Spatola encountered a number of Winters organization employees who recognized Spatola as a former member of their ranks. Sometime in 1987, Spatola began receiving threatening phone calls telling him he should not be in the candy business. One of the calls Spatola received was from a man named Kevin Miller who asked Spatola if he was planning, in his new job, to hire people away from the Winters candy operation. When Spatola replied that he was not, Miller stated, "that's good, I didn't think you would do that."

App. at 2998-999. There was no suggestion at trial that any of the threatening phone calls were made by Darrin Casper or that he was aware these calls had been made.

From June 14 to June 18, 1987, a three-day seminar was held in Houston for employees of the Winters organization. Approximately 200 people from all over the country attended the seminar in Houston. Darrin Casper, as an employee of the Winters group, was among those who attended the seminar. Casper is black. Testimony revealed that "quite a number" of black people attended the seminar. App. at 2909-10.

At 7:30 a.m. on June 19, 1987, Spatola discovered that the driver's side window of his Dodge van, parked in his driveway, had been broken. On the floor inside the van Spatola found an upside-down can of Sterno. Around the spot where the Sterno can was found there was a "small burn area" on the van's floor carpeting.

On the day prior to Spatola's discovery, William Fenwick, one of Spatola's next-door neighbors, saw two cars he did not recognize in the vicinity of the Spatola home. One of the cars "looked to be a Lincoln Continental" and the other Fenwick thought was a Chevrolet of some sort. App. at 2946. Standing outside one of the cars was a white man Fenwick described as tall, heavy-set and balding. That description generally matched the characteristics of Gerald Winters, as well as scores of other white men in the United States. Fenwick also observed three black men sitting in the Chevrolet. The white man gestured in the direction of Fenwick or Spatola's house.

Later in the afternoon, Fenwick saw the Lincoln pull into Spatola's driveway and a black man

whom Fenwick never identified proceeded toward the Spatola home. When the man realized he was being observed by Fenwick, he got back into the Lincoln and left. Later that day, Fenwick noticed the same Chevrolet parked one block away on a street parallel to the street on which Fenwick and Spatola's homes were located. A black man, again never identified by Fenwick, was standing outside of the Chevrolet observing the back of Spatola's home.

Between 1:00 and 2:00 a.m. on June 19, 1987, Fenwick's son-in-law, Matthew Stevenson, who was spending the night at Fenwick's home, stepped outside to smoke a cigarette. He saw a late model Lincoln with two black men inside pull into Spatola's driveway. A passenger of the car got out and walked to Spatola's van, rapidly returned to the car, and left. Stevenson, like Fenwick, was unable to identify either of the men he saw as Casper or any of the defendants on trial.

Spatola investigated and discovered that Winters was staying at the Sheraton Hotel near the Houston airport and had rented a Lincoln Town Car from Budget Rent-a-Car. He also learned that Casper occupied an additional room rented by Winters and that the account for that room had been closed at 2:41 a.m. on June 19, 1987. Spatola phoned the Budget office and warned the clerk to watch out for the return of the car Winters had rented.

At 12:47 p.m. on June 19, approximately twelve hours after the attempted arson observed by Peterson, the Lincoln rented by Winters was returned. Both the driver and passenger were black men. Patricia Norris, a Budget employee, identified Darrin Casper as the passenger of the

Lincoln upon its return.[3] Spatola later came to the Budget rental facility and, with the cooperation of Budget employees, examined the trunk of the Lincoln. In the trunk Spatola discovered candy, the lid of the Sterno can which Spatola had found in his van, a full can of Sterno, gloves, and screwdrivers.

Testimony was presented at trial to show that Winters was angry that Spatola was competing with him in the candy business. In 1987, Winters purportedly told two of his employees that in order to take care of Spatola "[w]e can just blow his van up." App. at 2876. Thereafter, two of Winters' employees located Spatola's home and wrote down the address.[4]

Another witness testified that in 1987 she heard a Winters employee, either Stephen Koch or Ron Crowe, state that Spatola owed Winters "a lot of money" and that they were "going to burn [Spatola's] van up" to take care of that problem. App. at 2921, 2933. No witness testified that Casper was seen at or near the Spatola home at any time nor was there testimony connecting Casper to any plan by Winters to threaten or harm Spatola or his property. There was no evidence that Casper was even aware such a plan existed.

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3. Norris identified the driver as Anthony Allen, who was also charged with Casper and Winters in the Spatola extortion and was acquitted by the jury of all charges.

4. One of these employees testified that he believed a lawsuit was being filed against Spatola by Winters and that Spatola's address was needed to serve papers on him.

IV.

In reviewing the sufficiency of the evidence to support Casper's conviction, we are mindful of the Supreme Court's holding that an appellate court must sustain the verdict of a jury if there is substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's decision. *Burks v. United States*, 437 U.S. 1, 17 (1978); *Glasser*, 315 U.S. at 80. In determining whether evidence is sufficient, we will not weigh evidence or determine the credibility of witnesses. *Glasser*, 315 U.S. at 80; *United States v. Inigo*, 925 F.2d 641, 649 (3d Cir. 1991). Appellate reversal on the grounds of insufficient evidence should be confined to cases where the failure of the prosecution is clear. *Burks*, 437 U.S. at 17; *Government of the Virgin Islands v. Brathwaite*, 782 F.2d 399, 404 (3d Cir. 1986); *United States v. Leon*, 739 F.2d 885, 891 (3d Cir. 1984). The evidence need not be inconsistent with every conclusion save that of guilt, so long as it establishes a case from which a jury could find the defendant guilty beyond a reasonable doubt. *United States v. Vastola*, 899 F.2d 211, 226 (3d Cir.), *vacated on other grounds*, 110 S.Ct. 3233 (1990); *United States v. Sandini*, 888 F.2d 300, 311 (3d Cir. 1989), *cert. denied*, 494 U.S. 1089 (1990); *United States v. Cooper*, 567 F.2d 252, 254 (3d Cir. 1977). A defendant challenging the sufficiency of the evidence bears a heavy burden. *Vastola*, 899 F.2d at 226. We believe Casper has successfully carried that burden.

The government's evidence against Casper was entirely circumstantial. While drawing inferences from established facts is an acceptable method of

proof when direct evidence is not available, the inferences drawn must have a logical and convincing connection to the facts established. *United States v. McNeill*, 887 F.2d 448, 450 (3d Cir. 1989), *cert. denied*, 493 U.S. 1087 (1990); *United States v. Bycer*, 593 F.2d 549, 551 (3d Cir. 1979). The fact that evidence is circumstantial does not mean it is less probative than direct evidence. *Bycer*, 593 F.2d at 551. However, where the government's evidence of defendant's guilt rests only upon a chain of inferences and the defendant contends that the evidence is insufficient to support the verdict, we must determine whether the "proved facts logically support the inference" of guilt. *Id.* In the present case, even having drawn all reasonable inferences from the evidence presented in the government's favor, we do not believe, as a matter of law, that the proved facts logically support the inference of Casper's guilt on Counts Five and Six.

The government would have us hold that Casper's presence as a passenger in the Lincoln Town Car returned to Budget approximately twelve hours after the attempt to burn Spatola's van is sufficient proof from which a jury could infer that he was one of the participants in that act. No witness identified Casper as one of the men seen in the vicinity of Spatola's home or van.[5] No

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5. The government also apparently believes that because some of the men seen near Spatola's home were black, the fact that Casper is black creates an inference that Casper was one of the men involved. We do not find Casper's race probative of anything. The evidence demonstrated that numerous black men were attending the seminar sponsored by the Winters organization and we are confident that a great many black men live in the Houston area.

witness testified that Casper was aware that Winters was interested in "getting even" with Spatola. Moreover, although evidence connecting the Lincoln to the arson attempt was found in the car's trunk, there was no evidence to show that Casper was aware of what was in the trunk of the Lincoln in which he was a passenger. In short, except for the fact that Casper was staying in a hotel room rented by Winters, there is no evidence that can be said to lead to the "logical" inference that he was involved in the Spatola extortion. Accordingly, we will reverse his conviction on Counts Five and Six.[6]

V.

In sum, we hold that the district court's determination that Casper failed to make a prima facie showing of racial discrimination in violation of the Equal Protection Clause was not clearly erroneous. However, we hold that the evidence presented by the government in support of Casper's guilt of Counts Five and Six was legally insufficient to support the jury's verdict. We will reverse the district court's order entering a judgment of conviction and sentence on Counts Five and Six of the indictment. The matter will be remanded to the district court with directions to enter an order dismissing the indictment against Casper.

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6. Having determined the evidence was insufficient to support the jury's verdict, we do not reach Casper's allegation that the district court erred in its instruction to the jury regarding the evaluation of eyewitness identification testimony.

BEST AVA

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Clerk of the United States Court of Appeals
for the Third Circuit

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-5243

UNITED STATES OF AMERICA

v.

GERALD WINTERS, a/k/a James Pierce,
a/k/a Ronald Rogers, a/k/a Jerry Domini,

Gerald Winters, Appellant

SUR PETITION FOR REHEARING

BEFORE: COWEN, NYGAARD and WEIS, Circuit Judges

The petition for panel rehearing filed by appellant in the above-entitled case having been submitted to the panel, and no member of the panel having asked for rehearing, the petition for panel rehearing is denied.

By the Court,

_____
Circuit Judge

Dated: MAR 11 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-5226

UNITED STATES OF AMERICA

v.

PAUL RAY,

Appellant

On Appeal from the United States
District Court for the District
of New Jersey
(D.C. Criminal No. 90-00164-07)
District Judge: Hon. Maryanne Trump Barry

Argued January 6, 1992

Before: COWEN, NYGAARD and WEIS,
Circuit Judges

JUDGMENT ORDER

After considering the contentions raised by appellant, to wit:

1. Whether the trial judge erroneously instructed the jury on the elements of substantive RICO; whether such error was harmless beyond a reasonable doubt;

2. Whether Title 18, United States Code, Section 1962(c) is void for vagueness as applied to appellant Paul Ray; and

3. Whether the trial judge erred in concluding that because he acted alone, she could not adjust Ray's role in the offense pursuant to Sentencing Guidelines Section 3B1.2; it is ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

ATTEST: By the Court,

Sally Mrvos, Clerk
Dated: FEB 12 1992

CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-5226

UNITED STATES OF AMERICA

v.

PAUL RAY,

Appellant

SUR PETITION FOR REHEARING

BEFORE: COWEN, NYGAARD and WEIS, Circuit Judges

The motion of appellant to join in Point One of the petition for panel rehearing filed by appellant Gerald Winters in No. 91-5243 having been granted; and the petition having been submitted to the panel, and no member of the panel having asked for rehearing, the petition for panel rehearing is denied.

By the Court,

_____
Circuit Judge

Dated: MAR 11 1992

(2)

No. 91-1982

Supreme Court, U.S.
FILED
JUL 8 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

GERALD WINTERS AND PAUL RAY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a RICO conspiracy charge requires proof that the defendant agreed to "personally commit" at least two predicate racketeering acts.

2. Whether the jury may have found petitioner Winters guilty of a RICO conspiracy charge on a legally insufficient ground.

3. Whether the prosecution violated *Batson* v. *Kentucky*, 476 U.S. 79 (1986), when it used one of its peremptory challenges to strike an Hispanic venireperson.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1982

GERALD WINTERS AND PAUL RAY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals affirming petitioner Winters' convictions (Pet. App. 1a-26a) and the judgment order of the court of appeals affirming petitioner Ray's conviction (Pet. App. 44a-45a) are unreported, but the judgments are noted at 958 F.2d 365 (Table). An opinion in a related case (Pet. App. 27a-41a), which was partially incorporated by reference as to petitioner Winters (Pet. App. 24a-25a), is reported at 956 F.2d 416.

JURISDICTION

The judgments of the court of appeals were entered on February 12, 1992. The petitions for rehearing were denied on March 11, 1992 (Pet. App. 42a-43a, 46a-

47a). The petition for a writ of certiorari was filed on June 8, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioners were convicted of violating the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c). Petitioner Winters was also convicted of conspiracy to violate RICO, 18 U.S.C. 1962(d), and of additional counts involving conspiracy and extortion in violation of the Hobbs Act, 18 U.S.C. 1951, and the Travel Act, 18 U.S.C. 1952. The district court sentenced Winters to a total of 415 months' imprisonment, to be followed by three years' supervised release. In addition, Winters was fined $450,000 and ordered to forfeit $650,000. The district court sentenced petitioner Ray to a 37-month prison term, to be followed by three years' supervised release. The court of appeals affirmed. Pet. App. 1a-26a (Winters); *id.* at 44a-45a (Ray).

1. The evidence at trial established "a classic case of the type of criminal conduct that the RICO statute was intended to reach." Pet. App. 5a. Beginning in the early 1970s and continuing through 1988, petitioner Winters founded and ran an organization of entities engaged in door-to-door sales of candy in several States. *Id.* at 3a-4a. Petitioner Ray was a supervisor in the Houston, Texas, area. Gov't C.A. Br. 6. Petitioners used violence and threats of violence to thwart competition from other entities engaged in door-to-door candy sales. The threats and violence were directed against competitors' employees, including former employees of the Winters organization. Pet. App. 4a.

During jury selection, the defense objected to the government's peremptory challenges, claiming that they were based on a discriminatory motive in violation of *Batson* v. *Kentucky*, 476 U.S. 79 (1986). Although the district court found that the defense had failed to raise a prima facie case of discrimination, the prosecutor stated his reasons for the exercise of each strike against a black venireperson. The district court concluded that the prosecutor's reasons were race-neutral and that the strikes were not based on a discriminatory intent. Pet. App. 32a-33a; C.A. Joint App. 566-567.

The jury returned special verdicts indicating that petitioner Winters committed five racketeering acts.[1] Those acts were established through proof of the following facts:

(a) In 1972, Winters threatened David Lawrenz, who ran a competing business in Milwaukee, Wisconsin, called Jobs for Kids. Lawrenz learned that his head supervisor's car had been vandalized by the Winters organization. Later, Winters told Lawrenz that Milwaukee was not big enough for both of them and that Lawrenz should join Winters' organization. When Lawrenz refused, Winters brandished a gun, told Lawrenz that he already had killed six people, and said that he would not hesitate to do so again if people got in his way. That night, several shots were fired

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[1] The jury made those findings both in returning its verdict as to the RICO conspiracy charge, C.A. Joint App. 129-132, and in returning its verdicts on the substantive RICO charge and the remaining counts, *id.* at 134-138. Petitioner Ray was found to have engaged in at least three acts of threatened violence and to have committed arson. See Gov't C.A. Br. 9-10; C.A. Joint App. 133. Ray does not raise any issues relating to the RICO charge in this Court. Pet. 9 n.3.

into Lawrenz's car, and Winters called to ask if he "g[o]t the message." Gov't C.A. Br. 7-8.

(b) On July 1, 1982, Winters and other members of his organization engaged in a brutal attack on Jim Anderson, who worked in Dallas, Texas, for a competing candy business. Winters personally used a baseball bat to strike numerous blows to Anderson's body. While striking the blows, Winters screamed at Anderson to "get out of the business and get out of Dallas." Winters then smashed the windshield of Anderson's car. Gov't C.A. Br. 8-9.

(c) On August 17, 1983, Grover Goodwin was severely beaten by two enforcers for Winters' organization. Goodwin, a former employee of the organization, had recently left to sell candy purchased from competing businesses. After the two men had finished pummeling Goodwin with a pipe, one of them asked whether Goodwin would continue to sell candy. Goodwin assured them he would not. Gov't C.A. Br. 10-11.

(d) On April 28, 1986, another former Winters' employee who had left the organization was brutally beaten. Rick Graef, who had participated with Winters in prior acts of violence, had left the organization to sell candy on his own. Two assailants subsequently entered Graef's Chicago-area hotel room and beat him severely with a baseball bat. While Graef was unable positively to identify either assailant because of the blood in his eyes, he testified he was "95 percent sure" that Winters was one of the assailants. Gov't C.A. Br. 11-12.

(e) In June 1987, Winters' employees broke the window of, and attempted to burn, a van belonging to Anthony Spatola, a former employee who had left to join a competing business. Winters had rented the Lincoln automobile seen in Spatola's driveway late in

the evening of the incident. Spatola subsequently discovered an open Sterno can upside down beside a burn mark in his van. When the Lincoln was returned to the rental agency by one of Winters' employees, the lid to a Sterno can and other suspicious materials were found in the trunk. Gov't C.A. Br. 12-13.

2. The court of appeals affirmed. Pet. App. 1a-26a, 44a-45a. The court rejected Winters' argument that the district court was required to instruct the jury that a RICO conspiracy charge requires proof that the defendant agreed to "personally commit" at least two predicate racketeering acts. *Id.* at 25a. The court indicated that it had previously concluded that RICO imposes no such requirement. *Ibid.*, citing *United States* v. *Adams*, 759 F.2d 1099, 1115-1116 (3d Cir.), certs. denied, 474 U.S. 906 and 474 U.S. 971 (1985).

The court of appeals also rejected Winters' claim that the evidence was insufficient to support his RICO conspiracy conviction. Pet. App. 5a-12a. Winters asserted that the government had to show that he conspired with the same person with respect to at least two racketeering acts. The court assumed that Winters was correct in stating that none of his co-defendants qualified for that role because the jury had acquitted them of the RICO conspiracy charge, and that two of the unindicted co-conspirators did not qualify for that role because the jury found that Winters did not agree to the acts they committed. *Id.* at 5a-6a. The court nevertheless concluded that "the evidence supports his conviction on the premise that he conspired with [unindicted co-conspirator] Rick Graef to violate [RICO] by agreeing to the commission of two racketeering acts." *Id.* at 8a-9a.

Finally, the court of appeals rejected the claim that the prosecution violated *Batson* v. *Kentucky*, 476 U.S.

79 (1986), by striking prospective black jurors from the panel on account of their race. Pet. App. 24a-25a (incorporating by reference *id.* at 28a-33a, 40a). The court held that the *Batson* challenge could be raised by all the defendants, regardless of race, under this Court's decision in *Powers* v. *Ohio*, 111 S. Ct. 1364 (1991) (holding that there is no requirement of racial identity between the defendant and the challenged jurors). Pet. App. 30a n.1. The court concluded, however, that the district court did not err in holding that the government gave race-neutral explanations for its strikes against black jurors and that the government did not have a discriminatory intent. *Id.* at 32a-33a.[2]

ARGUMENT

1. Petitioner Winters claims (Pet. 12-21) that the district court should have instructed the jury that a RICO conspiracy charge requires proof that the defendant agreed to "personally commit" at least two predicate racketeering acts. In early decisions addressing that issue, two courts of appeals stated that a conviction of RICO conspiracy requires that the defendant agree to personally commit two predicate crimes. See *United States* v. *Winter*, 663 F.2d 1120, 1136 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983); *United States* v. *Ruggiero*, 726 F.2d 913, 921 (2d Cir.), cert. denied, 469 U.S. 831 (1984). The majority of the courts of appeals that have addressed the issue, however, have refused to impose such a requirement, and this Court has consistently denied petitions for writs of certiorari seeking review of the issue. See, *e.g.*, *United States* v. *Pryba*, 900 F.2d 748, 760 (4th Cir.), cert. denied, 111 S. Ct. 305 (1990);

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[2] The court of appeals also rejected several evidentiary and sentencing challenges that are not renewed in this Court. Pet. App. 12a-24a.

United States v. *Leisure*, 844 F.2d 1347, 1367 (8th Cir.), cert. denied, 488 U.S. 932 (1988); *United States* v. *Rosenthal*, 793 F.2d 1214, 1228, modified, 801 F.2d 378 (11th Cir. 1986), cert. denied, 480 U.S. 919 (1987); *United States* v. *Neapolitan*, 791 F.2d 489, 497-498 (7th Cir.), certs. denied, 479 U.S. 939 and 479 U.S. 940 (1986); *United States* v. *Joseph*, 781 F.2d 549, 554-555 (6th Cir. 1986); *United States* v. *Adams*, 759 F.2d 1099, 1116 (3d Cir.), certs. denied, 474 U.S. 906 and 474 U.S. 971 (1985); *United States* v. *Tille*, 729 F.2d 615, 619 (9th Cir.), certs. denied, 469 U.S. 845 and 469 U.S. 848 (1984). There is no reason for a different result here.[3]

A "personally commit" instruction does not accurately state the law, but even if it did, petitioner was not prejudiced by the district court's failure to give it. The jury, through special verdicts, found that petitioner personally committed the same five racketeering acts that the jury found he had conspired to commit. Petitioner concedes that the purported "agreement to personally commit" requirement is satisfied "not only by an agreement to actually physically commit the racketeering acts, but also by an agreement to aid and abet or cause the commission of the acts." Pet. 20, citing *United States* v. *Rastelli*,

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[3] Since this Court's most recent denial of certiorari in a case raising the "personally commit" issue, the Tenth Circuit stated in *United States* v. *Sanders*, 929 F.2d 1466, cert. denied, 112 S. Ct. 143 (1991), that "although th[e] issue may be ripe for reconsideration at a future time and upon an opportunity for fuller briefing by the parties, for purposes of this appeal we adopt the rule of law that the defendant must agree to personally commit two predicate acts, not merely agree to the commission of two predicate offenses by any conspirator." *Id.* at 1473. Given the tentative nature of the court's holding, and the fact that it expressly decided the issue only "for purposes of this appeal," the issue must be deemed to remain open in the Tenth Circuit.

870 F.2d 822, 831-832 (2d Cir.), cert. denied, 493 U.S. 982 (1989). Because the jury's special verdicts establish that that requirement was satisfied in this case, C.A. Joint App. 130-138, petitioner would not prevail even on the theory he advocates.

2. Winters also contends (Pet. 22-29) that the jury may have based his RICO conspiracy conviction on a legally defective theory with respect to RICO's pattern-of-racketeering-activity requirement. The evidence before the jury indicated that Winters and Graef agreed to commit three racketeering acts: (a) the February 1972 incident involving the threats made to David Lawrenz; (b) the July 1982 beating of Jim Anderson; and (c) the 1983 assault of Grover Goodwin. Pet. App. 9a-11a. Petitioner does not challenge the sufficiency of the evidence as to those acts.[4] Rather, he speculates (Pet. 22-24) that the jury may have relied only on the 1972 and 1982 acts in finding that he conspired to engage in a "pattern of racketeering activity." Petitioner bases that speculation on two premises: the jury was not instructed that a RICO pattern requires that the last of the racketeering acts must have "occurred within ten years * * * after the commission of a prior act of racketeering activity," 18 U.S.C. 1961(5), and the evidence of Graef's involvement in the 1983 Goodwin

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[4] In the court of appeals, petitioner acknowledged that the evidence was sufficient to establish that "Graef agreed with Winters to the commission of two racketeering acts" with respect to Lawrenz and Anderson. Pet. C.A. Br. 25. Although petitioner obliquely questioned the sufficiency of the evidence with respect to the Goodwin act, *id.* at 25 n.19, the court of appeals found that the evidence was sufficient to establish "Graef's participation with Winters in the commission of the assault on Grover Goodwin in 1983." Pet. App. 10a. Petitioner does not challenge that conclusion here.

act was supposedly "ambiguous" (Pet. 24). Relying on *Griffin* v. *United States*, 112 S. Ct. 466 (1991), and *Yates* v. *United States*, 354 U.S. 298 (1957), petitioner asserts that his conspiracy conviction cannot stand because one of the alternative theories on which it may rest is legally insufficient. Pet. 25-27.

Petitioner acknowledges that he did not object to the district court's omission to instruct the jurors that the last of the racketeering acts must have occurred within ten years after a prior act. Pet. 23 n.8. Because he did not object to the jury instructions in the district court, petitioner cannot prevail on appeal unless he establishes that it was plain error, undermining the fundamental fairness of the trial and resulting in a miscarriage of justice, for the court not to give an instruction regarding the ten-year element of the RICO "pattern" requirement. See Fed. R. Crim. P. 30, 52(b); *United States* v. *Young*, 470 U.S. 1, 16 (1985); *United States* v. *Contreras*, 950 F.2d 232, 240 (5th Cir. 1991); *United States* v. *Tillem*, 906 F.2d 814, 825 (2d Cir. 1990). Petitioner fails to satisfy that standard.

The jury's special verdicts show that the jury found that petitioner agreed to commit racketeering acts in 1972, 1982, 1983, 1986, and 1987. C.A. Joint App. 107-110, 130-133. If the focus is limited to racketeering acts in which Graef was also involved (the 1972, 1982, and 1983 acts), the last act plainly occurred within ten years of a prior act. Petitioner's speculation that the jury may have found that Graef was involved in the 1972 and 1982 acts, but not the 1983 act, is implausible given the strong evidence that Graef participated in that act. Pet. App. 10a-11a. Because there was ample evidence before the jury to establish a legally sufficient RICO "pattern," petitioner has fallen far short of demonstrating a miscarriage of justice by the

omission of the instruction regarding the ten-year requirement. See *United States* v. *Alkins*, 925 F.2d 541, 553 (2d Cir. 1991) (deficient RICO "pattern" instruction was not plain error in light of evidence showing each required element of a pattern); *United States* v. *Valencia*, 907 F.2d 671, 687 (7th Cir. 1990) (same, with respect to failure to give a "substantial step" instruction in an attempt charge).

Even if petitioner were correct in his claim regarding the racketeering acts involving Graef, he would still not be entitled to relief. The court of appeals analyzed his claim on the assumptions, which it accepted solely for purposes of argument, that (1) Winters could not have been found guilty of conspiring with any co-defendant who was acquitted of conspiracy, and (2) a RICO conspiracy conviction requires a finding that Winters conspired with the same person with respect to two racketeering acts. Pet. App. 6a, 8a. Both assumptions are incorrect.

First, there is no requirement that the jury act consistently in returning verdicts with respect to separate counts or separate defendants. *United States* v. *Powell*, 469 U.S. 57 (1984); *United States* v. *Zuniga-Salinas*, 952 F.2d 876, 878 n.2 (5th Cir. 1992) (en banc) (collecting conspiracy cases involving inconsistent verdicts among alleged co-conspirators). Thus, the acquittal of his co-defendants does not imply that the jury found that Winters did not conspire with them. Second, a defendant need not conspire with the same person to commit two specific racketeering acts; the RICO statute requires only that the defendant agree to participate in the conduct of the affairs of an enterprise through the commission of at least two racketeering acts. *United States* v. *Campione*, 942 F.2d 429, 436-437 (7th Cir. 1991). Because the evidence was sufficient to show that

Winters conspired with his co-defendants to commit at least two racketeering acts, his conviction is valid without regard to whether he also conspired with Graef.

3. Finally, petitioners renew their claim (Pet. 30-39) that the prosecution violated *Batson* v. *Kentucky*, 476 U.S. 79 (1986). While apparently not challenging the finding of the district court, upheld by the court of appeals, that the strikes of the black venirepersons were not racially motivated, petitioners claim that the court erred in failing to rule explicitly on their claim that there was a prima facie case of discrimination with respect to the strike of one Hispanic venireperson. That fact-specific claim does not warrant this Court's review. In any event, petitioners' claim lacks merit.[5]

The district court found that petitioners failed to establish a prima facie case of discrimination. The court stated that "I, quite candidly, do not see a prima facie case of discrimination here. I don't see any intent to discriminate, I don't see even an inference of discrimination." C.A. Joint App. 566. Petitioners offer nothing to suggest that that finding is clearly erroneous. Noting that the prosecutor struck five

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[5] Petitioners suggest (Pet. 39) that because the district court seemed to think that white defendants could not challenge strikes of black and Hispanic jurors and because the court of appeals did not expressly pass on the strike of the Hispanic juror, the court of appeals implicitly departed from this Court's decision in *Powers* v. *Ohio*, 111 S. Ct. 1364 (1991). The court of appeals, however, expressly held that any "requirement that there be racial identity between the defendant and the jurors subject to the peremptory challenge was eliminated by the Supreme Court in *Powers* v. *Ohio*." Pet. App. 30a n.1.

blacks, three whites,[6] and one Hispanic, *id.* at 551, 559, petitioners assert that "[t]he government's challenges of all minorities informs a court's decision as to whether the government discriminated against any one minority venireperson." Pet. 34-35 (citing *United States* v. *Alvarado*, 923 F.2d 253, 255-256 (2d Cir. 1991)). But in light of the concurrent finding of both courts below that the strikes of the black jurors were not racially motivated, those strikes can have no conceivable bearing on whether the Hispanic juror was struck for impermissible reasons. Likewise, petitioners err in focusing on the government's observation that half of the venire was black and the sequence of its strikes against blacks. Pet. 36-37. Those actions do not imply a discriminatory motive against Hispanics.[7]

Others factors also cut against an inference that the prosecutor exhibited an anti-Hispanic intent. The prosecution struck one Hispanic, the defense struck one Hispanic, and one Hispanic served on the jury. Gov't C.A. Br. 18. There was, therefore, no pattern of

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[6] As petitioners note, Pet. 35, one challenge was against a venireperson "of undetermined but possibly Arabic descent." The record does not make clear that venireperson's background.

[7] Similarly, petitioners err (Pet. 35-36) in seeking to draw an inference of discriminatory intent from the government's suggestion in the district court that the court should have supplemented the jury pool by including venirepersons from counties that were mistakenly omitted. C.A. Joint App. 286-292. As the district court noted, the omission of those counties was due to "administrative error," and the government simply sought to remedy that error. *Id.* at 292. Moreover, the district court had ample opportunity to take the government's conduct into consideration in determining whether it was acting out of a discriminatory purpose against minorities, and the court found that it was not.

arguably discriminatory acts by the prosecution. Moreover, one of the prosecutors and a key government witness, but no defendants or defense witnesses, were Hispanic, *id.* at 18-19; those circumstances suggest no reason why the government would not want Hispanic jurors. Finally, contrary to petitioners' suggestion (Pet. 37-38), the fact that the prosecution expressed satisfaction with the panel and declined a peremptory challenge at a time when the Hispanic venireperson in question was still sitting supports (rather than undercuts) the conclusion that its later strike was nondiscriminatory. See *United States* v. *Alvarado*, 951 F.2d 22, 26 (2d Cir. 1991); *United States* v. *Montgomery*, 819 F.2d 847, 851 (8th Cir. 1987).

Petitioners have therefore failed to establish a prima facie basis for believing that the strike of the Hispanic venireperson was motivated by a discriminatory purpose. Accordingly, the court of appeals did not err by affirming without remanding for an explanation of the prosecutor's reasons.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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